IT 04-6
Tax Type: Income Tax
Issue: Investment Tax Credit

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE	)	Docket No.	02-IT-0157
OF THE STATE OF ILLINOIS	)	FEIN	36-3961038
v.	)	Tax Years Ending	12/95 - 12/96
ABC CORPORATION,	)	John E. White,	
Taxpayer	)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION REGARDING
THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

Appearances: Brian Browdy & Michael Israel, Horwood Marcus & Berk, appeared for ABC Corporation; David Dorner, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter arose after ABC Corporation ("ABC") filed separate amended Illinois income tax returns for tax years ending December 31, 1995 and December 31, 1996, in which it claimed amounts of replacement tax investment credits for each of those years. The Illinois Department of Revenue ("Department") denied those amended returns, after which ABC timely protested those denials, and requested a hearing.

The parties thereafter filed cross motions for summary judgment. I am including within this order and recommendation a brief statement of the material facts not at issue. I recommend that the Department's motion be granted, and that ABC's motion be denied.

Facts Not in Dispute:

1. Together with other corporations, ABC conducts a single unitary business. *See* Department Motion for Summary Judgment ("Department's MSJ"), Ex. A (ABC's Amended Protest, dated 4/10/03), p. 1 (¶ 2 of section designated, "Facts").

2. One of the members of ABC's unitary business group is XYZ ("XYZ"), a wholly owned subsidiary. *See* Department's MSJ, Ex. A, p. 1 (¶ 2).

3. XYZ was, during the years at issue, a public utility company principally engaged in the production, purchase, transmission, distribution and sale of electricity. Department MSJ, Ex. A, p. 1 (¶ 3); Taxpayer's Motion for Leave to Supplement its Response to Department's Motion for Summary Judgment and Cross-Motion for Summary Judgment ("ABC's Supplement to MSJ"), Ex. A (Affidavit of John Doe) (¶ 3).

4. XYZ purchased generation, transmission and distribution property that was depreciable pursuant to § 167 of the Internal Revenue Code, and placed such property in service in Illinois during the years at issue. Department's MSJ, Ex. A, p. 1 (¶ 5).

5. XYZ used that property in generating and transmitting electrical power and delivering it to XYZ's customers. *Id.*; ABC's Supplement to MSJ, Ex. A (¶ 3). Such property had not previously been used in Illinois. Department's MSJ, Ex. A, p. 1 (¶ 5).

6. ABC timely filed Illinois combined income tax returns for tax years ending December 31, 1995 and December 31, 1996. Department's MSJ, Ex. A, p. 1 (¶¶ 1-2 of section designated, "Facts").

7. On its original combined Illinois returns, neither ABC nor XYZ claimed any amount as a credit authorized by § 201(e) of the Illinois Income Tax Act ("IITA") against its Personal Property Tax Replacement Income Tax ("replacement tax") liability. Department's MSJ, Ex. A, p. 1 (¶ 4); 35 ILCS 5/201(c).

8. On May 28, 1998, ABC timely filed an amended Illinois combined income tax return on which it claimed a § 201(e) credit for its 1995 tax year in the amount of $10,419,507.00. Department MSJ, Ex. A, p. 2 (¶ 6). On the same day, ABC timely filed an amended Illinois combined income tax return on

which it claimed a § 201(e) credit for its 1996 tax year in the amount of $4,398,115.00. Department's MSJ, Ex. A, p. 2 (¶ 7).

9. The Department issued denials of ABC's amended returns on July 12, 2002 and November 7, 2002, respectively, after which ABC protested those denials. Department MSJ, Ex. A, p. 2 (¶¶ 8-11).

Conclusions of Law:

This matter involves the question whether ABC, the parent of a public electric utility company, is entitled to a § 201(e) credit for property used to produce, transmit and distribute electricity. When a person seeks to take advantage of deductions or credits allowed by statute, the burden of proof is on the taxpayer. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981) (*citing* Bodine Electric Co. v. Allphin, 81 Ill.2d 502, 410 N.E.2d 828 (1980); Telco Leasing, Inc. v. Allphin, 63 Ill.2d 305, 347 N.E.2d 729 (1976)). The parties elected to proceed via cross-motions for summary judgment.

Summary judgment is appropriate when resolution of the case hinges on a question of law. First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 651 N.E. 2d 1105 (1995); Kirk Corp. v. Village of Buffalo Grove, 248 Ill. App. 3d 1077, 618 N.E. 2d 789 (1st Dist. 1993). Summary judgment is also appropriate when the parties dispute the correct construction of an applicable statute. Bezan v. Chrysler Motors Corp., 263 Ill. App. 3d 858, 636 N.E. 2d 1079 (2nd Dist. 1994). Where both parties file motions for summary judgment, only a question of law is raised. Lake Co. Stormwater Mgmt. Comm. v. Fox Waterway Agency, 326 Ill. App. 3d 100, 104, 759 N.E.2d 970, 973 (2d Dist. 2001). Because this matter involves the parties' cross-motions for summary judgment regarding an issue on which taxpayer bears the burden of proof, ABC here bears the burden of showing, as a matter of law, that it has a clear right to the credit claimed. *See* Balla, 96 Ill. App. 3d at 296, 421 N.E.2d at 238.

Section 201(c) of the IITA imposes what is commonly referred to as a replacement tax on every corporation, partnership and trust, for the privilege of earning or receiving income in or as a resident of Illinois.

35 **ILCS** 5/201(c). Section 201(e) grants a credit that may be applied against a person's replacement tax liability for investment in qualified property. 35 **ILCS** 5/201(e). Specifically, § 201(e) provides:

> (e) Investment credit. A taxpayer shall be allowed a credit against the Personal Property Tax Replacement Income Tax for investment in qualified property.
>
> (1) A taxpayer shall be allowed a credit equal to .5% of the basis of qualified property placed in service during the taxable year, provided such property is placed in service on or after July 1, 1984.
>
> ***
>
> (2) The term "qualified property" means property which:
>
> (A) is tangible, whether new or used, including buildings and structural components of buildings and signs that are real property, but not including land or improvements to real property that are not a structural component of a building such as landscaping, sewer lines, local access roads, fencing, parking lots, and other appurtenances;
>
> (B) is depreciable pursuant to Section 167 of the Internal Revenue Code, except that "3-year property" as defined in Section 168(c)(2)(A) of that Code is not eligible for the credit provided by this subsection (e);
>
> (C) is acquired by purchase as defined in Section 179(d) of the Internal Revenue Code;
>
> (D) is used in Illinois by a taxpayer who is primarily engaged in manufacturing, or in mining coal or fluorite, or in retailing; and
>
> (E) has not previously been used in Illinois in such a manner and by such a person as would qualify for the credit provided by this subsection (e) or subsection (f).
>
> (3) For purposes of this subsection (e), "manufacturing" means the material staging and production of tangible personal property by procedures commonly regarded as manufacturing, processing, fabrication, or assembling which changes some existing material into new shapes, new qualities, or new combinations. For purposes of this subsection (e) the term "mining" shall have the same meaning as the term "mining" in Section 613(c) of the Internal Revenue Code. For purposes of this subsection (e), the term "retailing" means the sale of tangible personal property or services rendered in conjunction with the sale of tangible consumer goods or commodities.

35 **ILCS** 5/201(e) (emphasis added).

The point of law the parties dispute is whether XYZ, a public electric utility company, is primarily engaged in retailing, as that term is defined in § 201(e)(3).

The Department's Motion

The Department argues it is entitled to judgment as a matter of law because there is no dispute that ABC is engaged in the production, purchase, transmission, distribution and sale of electricity, and because "[t]he Illinois Supreme Court has consistently ruled that electricity is not a tangible, but is an intangible. Thus, taxpayer is not engaged in 'retailing' because it is does not sell tangible personal property." Department's Memorandum of Law in Support of the Department's MSJ ("Department's Brief"), p. 2.

The Department cites Farrand Coal Co. v. Halpin, 10 Ill. 2d 507, 140 N.E.2d 698 (1957), as the case in which the Illinois Supreme Court most recently held that electricity is not tangible personal property. Department's Brief, pp. 10-12. That case involved Farrand Coal Co.'s sales of coal to a purchaser who was engaged in the business of producing and selling electricity. Farrand Coal Co. paid the tax attributable to such sales under protest, then filed an action to have the tax monies returned to it, and to have the court declare that such sales were sales of tangible personal property for resale. Farrand Coal Co., 10 Ill. 2d at 508, 140 N.E.2d at 699.

Farrand Coal claimed that its sales to a utility company were really its sales of energy contained within the coal, and which the purchaser merely converted into electrical energy, thereby making the coal a constituent part of the electrical energy the utility was engaged in the business of selling. *Id.*, 10 Ill. 2d at 508-09, 140 N.E.2d at 699. The Court rejected the retailer's argument generally, and specifically rejected the argument that a utility is engaged in the business of selling electrical energy as tangible property:

> Although this court recognizes electricity as personal property, it has at no time held electricity to be "tangible" personal property. In *Peoples Gas Light and Coke Company v. Ames*, 359 Ill. 152, it was held that gas and electric public utilities were engaged in a service business and not subject to the retailers' occupation tax, and decision as to whether or not electricity was tangible personal property was expressly declined as unnecessary to a disposition of the case.
>
> In *People v. Menagas*, 367 Ill. 330, electric current was held to be a subject of larceny under the Illinois Criminal Code. Such decision held only that electric current and energy was personal property as distinguished from real property, and in fact on pages **333 and 338 the court twice referred to electrical energy as being intangible**.

> Most of the authorities relied on by plaintiff holding electricity to be tangible personal property are from foreign jurisdictions involving statutes specifically declaring electricity to be such. Of course, such definition is not present in the instant statute here in issue. The other cases relied on by plaintiff hold electric utility companies to be engaged in manufacturing commodities. Such cases are contrary to the holding of this court in *People ex rel. Mercer v. Wyanet Electric Light Co.* 306 Ill. 377, that electric utility companies are neither manufacturing nor mercantile companies so as to have their capital stock assessed locally instead of by the State assessing authority.
>
> ***
>
> The sale of electrical energy generated by the utility through the use or consumption of coal as a service to the utility customers is not, within the ordinary meaning of the statutory language, a sale "of tangible personal property [coal], which property as an ingredient or constituent goes into and forms a part of tangible personal property [electrical energy] subsequently the subject of a 'sale at retail.' "

Farrand Coal Co., 10 Ill. 2d at 512-13, 140 N.E.2d at 701 (emphasis added).

The Farrand Coal Co. decision, and the other cases cited therein, firmly establish that the Illinois Supreme Court has, long ago and consistently, determined that utility companies are not engaged in the business of selling tangible personal property, as that term is used in the ROTA, and that they are instead engaged in business as providers of other services. *See, e.g.*, Illinois Bell Telephone Co. v. Ames, 364 Ill. at 369-70; Peoples Gas, Light and Coke Co. v. Ames, 359 Ill. 152, 157-58 (1935) (public utility companies not subject to Retailers' Occupation Tax, in part, because Illinois' Public Utilities Act described "[t]he furnishing of any commodity … as 'service.'"); *see also* People ex rel. Mercer v. Wyanet Electric Light Co., 306 Ill. 377 (1923) (public utility company was not "organized for purely manufacturing and mercantile purposes" so as to exempt it from paying tax on its capital stock).

The question here is whether the Illinois Supreme Court's long-standing determination that providers of electricity are not engaged in selling tangible personal property, as that term is used in the ROTA, has any effect on whether providers of electricity are engaged in selling tangible personal property, as that phrase is used in the IITA. Another way to ask the same question is whether the Court's long-standing holding that providers of electricity are engaged in a service occupation, and not engaged in selling tangible personal property, is

applicable to whether such persons are primarily engaged in retailing, as that term is defined in IITA § 201(e)(3). The text of the applicable Illinois income tax regulation, and others in effect during the years at issue, and a recent Illinois appellate court decision interpreting § 201(e)(3) of the IITA, support an affirmative answer to those two related questions.

The text of Illinois income tax regulation ("IITR") § 100.2100(c) during the years at issue provided a description of those activities that the Department declared it would not consider retailing. That applicable regulation provided, in pertinent part:

> 9) Retailing. Retailing is defined as the sale of tangible personal property. … The following activities are not considered retailing operations:
>
> ***
>
> C) Other service professions which do not involve the transfer of tangible personal property other than as an incident to the service performed. For guidance in distinguishing service professions from retailing professions, the Department will rely on rules promulgated under the Service Occupation Tax Act at 86 Ill. Adm. Code 140;
>
> ***

86 Ill. Admin. Code § 100.2100(c)(9) (1985). Section 140.125 of Illinois' Service Occupation Tax Act ("SOTA") regulations, in turn, expressly provides that the SOTA, which imposes a tax on persons who transfer tangible personal property incident to a sale of service, does not apply to transfers of intangible personal property. 86 Ill. Admin. Code § 140.125(a). Thus, the regulation the Department specifically adopted to administer and enforce the provisions of IITA § 201(e)(3) reflect the applicability of the Court's Farrand Coal Co. decision to a determination of whether a person is primarily engaged in retailing, and thus entitled to a IITA § 201(e) credit. Providers of electricity, as sellers of services, are not primarily engaged in retailing, as that term is defined in IITA § 201(e)(3). 86 Ill. Admin. Code § 100.2100(c)(9) (1985); 86 Ill. Admin. Code § 140.125.

The Illinois Appellate Court's decision in Schawk, Inc. v. Zehnder, 326 Ill. App. 3d 752, 761 N.E.2d 192 (1st Dist. 2001) also reflects how the same reasoning the Court used in Farrand Coal Co., and the decisions

cited therein, are applicable to the IITA. Schawk involved a taxpayer's claim to a § 201(e) credit against its replacement tax liability. *Id.* Schawk produced and sold color-separated film used by its customers to print packaging materials for consumer products such as cereal boxes, promotional materials and in-store displays. *Id*. at 753, 761 N.E.2d at 193. Schawk claimed entitlement to a § 201(e) credit because, it said, it was primarily engaged in manufacturing, as that term is defined in § 201(e)(3). *Id*. at 754-55, 761 N.E.2d at 194.

The court, however, held that Schawk was not entitled to a § 201(e) credit because it was engaged in a service business, and that its service business was not the same as manufacturing tangible personal property. Schawk, 326 Ill. App. 3d at 755, 761 N.E.2d at 195 ("We find that the plain language of the statute at issue is clear and that the activities engaged in by Schawk are not embraced under the statute's definition of manufacturing.") The court further held that "the inclusion of Schawk's business in the classification 'manufacturing' is inconsistent with Illinois precedent classifying the graphic arts as a service occupation in the context of other tax statutes." *Id*. at 756, 761 N.E.2d at 195. While the specific issue in Schawk involved whether the taxpayer was engaged in manufacturing and not retailing, the case clearly reflects the appellate court's application of the Illinois's long-standing distinction, for purposes of other Illinois taxes, between persons who are engaged in providing services versus those who are engaged in the businesses defined by IITA § 201(e)(3).

In sum then, the Illinois Supreme Court has long held that providers of electricity, like XYZ, are not engaged in the business of selling tangible property. The Illinois appellate court has, more recently, held a person that was engaged in a service business was not primarily engaged in one of the three businesses described in § 201(e), and defined within IITA § 201(e)(3), and therefore, was not entitled to claim a § 201(e) credit. Finally, the IITR the Department adopted to administer and enforce IITA § 201(e) states that providers of services are not engaged in retailing, as that term is defined in IITA § 201(e)(3). Those legal determinations are all applicable to the undisputed facts set forth by the record here. Applying the undisputed facts to those

legal determinations establish, as a matter of law, that XYZ is not primarily engaged in the business of retailing, as that term is defined in IITA § 201(e)(3).

ABC's Motion

ABC argues that it is primarily engaged in retailing because electricity is tangible property as a matter of both income tax law and objective scientific fact. Taxpayer's Response to Department's Motion for Summary Judgment and Taxpayer's Cross-Motion for Summary Judgment ("ABC's MSJ"), p. 3. ABC bases its claim that electricity is tangible personal property, as a matter of federal income tax law, on § 102 of the IITA. *Id*., p. 4. It argues that electricity is tangible personal property, as a matter of scientific fact, based on the opinion of Joel Fajans ("Fajans"), a Ph.D. and physics professor at the University of California, Berkley. *Id*. pp. 5-8. & Exhibits A (Fajans' Affidavit), A-1 (Fajans' report prepared for ABC), A-2 (Fajans' curriculum vitae), thereto. I address each of ABC's assertions separately.

Whether Electricity Constitutes "Tangible Personal Property" As A Matter Of Settled Federal Income Tax Law

ABC argues that, by passing § 102 of the IITA in 1969, the Illinois General Assembly intended to disavow the holding of Farrand Coal Co. — as well as all of the cases invoked by the Court in that decision — as a guide to interpreting the text of the IITA. ABC's MSJ, p. 4. Section 102 of the IITA provides as follows:

> Construction.
>
> Except as otherwise expressly provided or clearly appearing from the context, any term used in this Act shall have the same meaning as when used in a comparable context in the United States Internal Revenue Code of 1954 or any successor law or laws relating to federal income taxes and other provisions of the statutes of the United States relating to federal income taxes as such Code, laws and statutes are in effect for the taxable year.

35 **ILCS** 5/102.

ABC posits that the phrase that is undefined by the legislature in § 201(e)(3) is tangible personal property. *See* ABC's MSJ, p. 4. ABC next asserts that, since "[i]t is a matter of settled federal income tax law that electricity is tangible personal property[,]" § 102 requires that § 201(e)(3)'s definition of retailing be

governed by the meaning given to the Internal Revenue Code's ("IRC['s]") use of the phrase tangible personal property. *See id*.

I must reject, however, ABC's argument that § 102 of the IITA has the effect it describes. First of all, the context within which the phrase tangible personal property is used within § 201(e), and consistently used elsewhere within the IITA, provides the clear meaning of that phrase. In such circumstances, § 102 plainly expresses the legislature's intent that there is no need to look to the IRC for the meaning of the same term. 35 **ILCS** 5/102. Thus, ABC not only ignores the context in which the phrase is used in §§ 201(c), (e), and elsewhere within the IITA, but it also ignores the significant opening proviso of IITA § 102.

Under basic rules of statutory construction, moreover, where the same words appear in different parts of the same statute, they should be given the same meaning unless something in the context indicates that the legislature intended otherwise. Guillen v. Potomac Insurance Co. of Illinois, 203 Ill. 2d 141, 152, 785 N.E.2d 1, 8 (2003). Since the legislature repeatedly used the same phrase elsewhere within the IITA, it is only reasonable to conclude that the legislature intended the phrase to have the same meaning. Montano v. City of Chicago, 308 Ill. App.3d 618, 624, 720 N.E.2d 628, 633 (1st Dist. 1999) ("When the same word is used twice in close proximity, there is a presumption that the word has the same meaning in both places."). The decision in Schawk further militates against accepting ABC's claim that the definition of retailing set forth in IITA § 201(e)(3) must be governed by the meaning ascribed to tangible personal property as used in the IRC, instead of by the commonly understood meaning of the same phrase under Illinois law. Schawk, Inc., 326 Ill. App. 3d 752, 761 N.E.2d 192.

The phrase tangible personal property is repeatedly used in Article 3 of the IITA, which sets forth the Act's apportionment and allocation provisions. The text and context of the legislature's use of the phrase within the sections in Article 3 establish, beyond any doubt, that the legislature intended the phrase tangible personal property to mean something quite different than intangible property. For example, IITA § 303 provides for the

allocation of nonbusiness income by nonresidents of Illinois. 35 **ILCS** 5/303. In subparagraphs (a)(2) and (a)(3) of that section, the Illinois General Assembly distinguished between how items of nonbusiness income are to be allocated to Illinois, depending on whether the income was derived from a nonresident's transactions involving tangible personal property, or from transactions involving intangible property. The applicable parts of § 303(a) provide:

> (2) Tangible personal property. Capital gains and losses from sales or exchanges of tangible personal property are allocable to this State if, at the time of such sale or exchange:
>
> (A) The property had its situs in this State; or
>
> (B) The taxpayer had its commercial domicile in this State and was not taxable in the state in which the property had its situs.
>
> (3) Intangibles. Capital gains and losses from sales or exchanges of intangible personal property are allocable to this State if the taxpayer had its commercial domicile in this State at the time of such sale or exchange.
>
> ***

35 **ILCS** 5/303(a)(2)-(3). If the Illinois General Assembly intended IITA § 102 to make inapplicable to the IITA an entire line of Illinois cases that distinguished, for other tax purposes, between sellers of tangible personal property versus sellers of intangible personal property, then why did the legislature continue, within the IITA, to distinguish between transactions involving tangible personal property and transactions involving intangible personal property?

More importantly, the phrase tangible personal property is also used within IITA § 304. 35 **ILCS** 5/304. That section requires nonresidents who earn income from Illinois and non-Illinois sources to apportion items of business income using separate payroll, property and sales factors. 35 **ILCS** 5/304(a). During the years at issue, XYZ was required to use three-factor apportionment. *Compare* 35 **ILCS** 5/304(b) *with* 35 **ILCS** 5/304(c)-(e). Section 304(a)(1) describes which items of business income shall be included within the numerator and denominator of the property factor. 35 **ILCS** 5/304(a)(1). During the years at issue, it required taxpayers to include in the numerator of their property factor "the average value of the person's real and tangible personal

property owned or rented and used in the trade or business in this State during the taxable year ….” 35 **ILCS** 5/304(a)(1).

If ABC were consistent in its argument that, for income tax purposes, the Illinois General Assembly intended tangible personal property to include electricity, then that means that ABC, XYZ, and every other member of ABC’s unitary business group conducting business in Illinois, would have been required to include the value of the electricity each used in Illinois in its business within the numerator of its property factor. 35 **ILCS** 5/304(a)(1). ABC, however, never once asserts in its motion, let alone provides evidence to establish, that it and the other members of its unitary group did so, because each believed (as ABC suggests here) that electricity is included within the meaning of tangible personal property, as that phrase is used in IITA §§ 201(e)(3) and 304(a)(1). The reasons why such an argument and evidence is missing from ABC’s motion is likely twofold. First, ABC does not want to encourage any thorough or logical analysis of the context in which the phrase tangible personal property is repeatedly used within the IITA, because, for its purposes in this matter, it much prefers a meaning ascribed to the same phrase when used in the IRC. Second (and much more practically), if tangible personal property includes electricity for purposes of IITA § 201(e)(3), it also includes electricity for purposes of IITA § 304(a)(1). Guillen, 203 Ill. 2d at 152, 785 N.E.2d at 8. That means that XYZ (and every other member of the ABC unitary business group having an Illinois reporting obligation) were required to include the value of the electricity used in its business in Illinois within the numerator of its property factor. 35 **ILCS** 5/304(a)(1). That, in turn, would tend to increase XYZ’s (and every other reporting member’s) Illinois income and replacement tax liabilities. ABC’s motion focuses only on reasons why it should be granted a tax credit; it does not want to discuss how its reasoning might affect the statute or the Act as a whole. By avoiding any analysis of the context in which the identical phrase is used elsewhere within the IITA, ABC similarly avoids having to address the quite substantial effects, upon itself, that accepting its argument would have on the interpretation of those other sections of the IITA.

For an example of just one likely effect such acceptance might yield, see In Re Appeal Of Pacificorp, No. 90027, 2002 WL 31153476 (Cal.St.Bd.Eq. September 12, 2002). That matter, cited by the Department in its response to ABC's motion, involved a dispute regarding the interpretation of §§ 25135 and 25136 of California's Tax and Revenue Code. In re Pacificorp, 2002 WL 31153476 at **1-2. Those provisions serve the same purpose as IITA §§ 304(a)(3)(B) & (C) — which is to say that they describe which items of business income are attributable to the taxing state.[1] Cal. Tax & Rev. Code §§ 25135-25136 (*quoted id*. at *2); 35 **ILCS**

---

[1] During the years involved in the Pacificorp dispute, § 25135 of California's Tax & Revenue Code, and during the years at issue here, § 304(a)(3)(B) provided, respectively:

> 25135. Sales of tangible personal property are in this state if:
> (a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale.
> (b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.
>
> 304(a)(3)(B). Sales of tangible personal property are in this State if:
> (i) The property is delivered or shipped to a purchaser, other than the United States government, within this State regardless of the f. o. b. point or other conditions of the sale; or
> (ii) The property is shipped from an office, store, warehouse, factory or other place of storage in this State and either the purchaser is the United States government or the person is not taxable in the state of the purchaser; provided, however, that premises owned or leased by a person who has independently contracted with the seller for the printing of newspapers, periodicals or books shall not be deemed to be an office, store, warehouse, factory or other place of storage for purposes of this Section. Sales of tangible personal property are not in this State if the seller and purchaser would be members of the same unitary business group but for the fact that either the seller or purchaser is a person with 80% or more of total business activity outside of the United States and the property is purchased for resale.

During the same periods, § 25136 of California's Tax & Revenue Code and IITA § 304(a)(3)(C) provided, respectively:

> § 25136. Sales, other than sales of tangible personal property, are in this state if:
> (a) The income-producing activity is performed in this state; or
> (b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.
>
> § 304(a)(3)(C). Sales, other than sales of tangible personal property, are in this State if:
> (i) The income-producing activity is performed in this State; or
> (ii) The income-producing activity is performed both within and without this State and a greater proportion of the income-producing activity is performed within this State than without this State, based on performance costs.

5/304(a)(3)(B)-(C) (1996). The California Franchise Tax Board ("FTB"), which is California's counterpart to the Department, sought, in Pacificorp, to have an electric company's business income from certain sales of electricity apportioned as sales of tangible personal property. In re Pacificorp, 2002 WL 31153476 at *2. The FSB's position (essentially, that the sale of electricity constitutes the sale of tangible personal property) was supported, in part, by the opinion of Joel Fajans, the same individual ABC uses here to support its motion. *See id*. at *5; ABC's MSJ, pp. 6-7 & Ex. A (Fajans' Affidavit), A-1 (Fajans' report). The California Board of Equalization ultimately rejected the FTB's position, after concluding that the transmission of electricity was a sale of service (much as the Illinois Supreme Court concluded in Farrand Coal and previously), which was more properly apportioned pursuant to § 25136, the section governing sales, other than sales of tangible personal property. In re Pacificorp, 2002 WL 31153476 at *9; c*ompare also* Cal. Tax & Rev. Code § 25136 *with* 35 **ILCS** 5/304(a)(3)(C) (1996). I acknowledge that In re Pacificorp is not precedential, and holds no sway over my conclusion in this recommendation. I cite it, again, as just one example of the types of disputes one might reasonably anticipate if I, or the Director, were to accept ABC's argument that the Illinois General Assembly intended tangible personal property, as that phrase is used in the IITA, to include electricity.

I must also reject ABC's claim that it is "settled federal income tax law" that electricity is tangible personal property. That is because of the nature of the authority ABC cites to support that proposition. Indeed, ABC cites no primary authority at all. For example, ABC does not assert that Congress, in a particular section of the IRC, included text stating that tangible personal property includes electricity. Nor does ABC cite to a properly promulgated federal regulation in which the Department of the Treasury has adopted a regulation in which it announced to the public, following notice and comment, that tangible personal property includes electricity. Based on my review of the Code provisions and Treasury regulations described in the sources ABC cites to support the proposition, I am comfortable in concluding that no such federal income tax statute or treasury regulation exists. 26 U.S.C. § 263A; 26 C.F.R. § 1.263A-2(a)(2). At the very minimum, ABC has not

identified any provisions that say what ABC suggests. Finally, ABC cites to no precedential or persuasive judgment entered by a federal court in a case involving a dispute regarding the meaning of such term, as used in the applicable federal tax statute or regulation.

Instead, ABC cites three private letter rulings ("PLR's"), a chief counsel advisory ("CCA") and a technical advice memorandum ("TAM") written and, after being redacted, published by the IRS regarding the applicability of the accounting method required by § 263A of the IRC. ABC's Motion, p. 4 (*citing* 2001 PRL LEXIS 1450 (Sep. 25, 2001); 2001 PRL LEXI 1405 (Sep. 18, 2001); 2001 LEXIS 1185 (June 20, 2001); 2001 PRL LEXIS 1186 (Aug. 14, 2001); 1995 PRL LEXIS 651 (Feb. 15, 1995).[2] In other words, the authority ABC relies on to support its argument that, as a matter of settled federal income tax law, electricity is tangible personal property, consists of the mere position statements of the IRS. *Id*.

Contrary to ABC's argument, what *is* a settled matter of federal income tax law is that IRS determinations like the ones cited by ABC here have no value whatever as precedent. 26 U.S.C. § 6110(j)(3). Indeed, each of the documents cited by ABC includes the statement, "This document may not be used or cited as precedent[,]" followed by a citation to IRC § 6110(j)(3). Section 6110(j)(3) of the IRC provides:

> Precedential status
> Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.

26 U.S.C. § 6110(j)(3).[3] ABC, therefore, is simply wrong — as a matter of law — to suggest that the question of whether electricity constitutes tangible personal property is "settled." 26 U.S.C. § 6110(j)(3).

---

[2] The Department's Office of Administrative Hearings uses the other major legal research provider, Westlaw, and that provider's cites corresponding to the documents ABC relies upon are, respectively: 2001 WL 1659980 (IRS PLR) (Sept. 25, 1991); 2001 WL 1638435 (IRS CCA) (Sept. 18, 2001); 2001 WL 1451836 (IRS PLR) (June 20, 2001); 2001 WL 1451856 (IRS PLR) (Aug. 14, 2001); 1995 WL 397457 (IRS TAM) (Feb. 15, 1995).

[3] Subtitle D of title 26 is titled "Miscellaneous Excise Taxes," and that subtitle includes §§ 4000 to 5000 of the IRC. 26 U.S.C. §§ 4001 – 5000. Those sections have no applicability here.

But even if the meaning of tangible personal property was a matter of settled federal income tax law, for purposes of IRC § 263A, IITA § 102 still provides that "[e]xcept as otherwise expressly provided or clearly appearing from the context," the meaning of a term appearing in the IITA "shall have the same meaning as when used in a comparable context in the [IRC] …." 35 **ILCS** 5/102. It is, therefore, appropriate to consider both the context in which the phrase "tangible personal property" appears in the IRC, and whether that context is comparable to the context of IITA § 201(e)(3).

Congress included the phrase "tangible personal property" in § 263A of the IRC. 26 U.S.C. § 263A. That section makes certain costs of a person's business not currently deductible in the year in which they were incurred. It requires taxpayers, instead, to capitalize such costs over the life of the property purchased. Specifically, the applicable portions of that section provide:

> 263A. Capitalization and inclusion in inventory costs of certain expenses
> (a) Nondeductibility of certain direct and indirect costs. --
> (1) In general. -- In the case of any property to which this section applies, any costs described in paragraph (2) --
> (A) in the case of property which is inventory in the hands of the taxpayer, shall be included in inventory costs, and
> (B) in the case of any other property, shall be capitalized.
> (2) Allocable costs. -- The costs described in this paragraph with respect to any property are--
> (A) the direct costs of such property, and
> (B) such property's proper share of those indirect costs (including taxes) part or all of which are allocable to such property.
> Any cost which (but for this subsection) could not be taken into account in computing taxable income for any taxable year shall not be treated as a cost described in this paragraph.
> (b) Property to which section applies. -- Except as otherwise provided in this section, this section shall apply to --
> (1) Property produced by taxpayer. -- Real or tangible personal property produced by the taxpayer.
> (2) Property acquired for resale. --
> (A) In general. -- Real or personal property described in section 1221(a)(1) which is acquired by the taxpayer for resale.
> (B) Exception for taxpayer with gross receipts of $10,000,000 or less. -- Subparagraph (A) shall not apply to any personal property acquired during any taxable year by the taxpayer for resale if the average annual gross receipts of the taxpayer (or any predecessor) for the 3-taxable year period

> ending with the taxable year preceding such taxable year do not exceed $10,000,000.
>
> (C) Aggregation rules, etc.--For purposes of subparagraph (B), rules similar to the rules of paragraphs (2) and (3) of section 448(c) shall apply.
>
> For purposes of paragraph (1), the term "tangible personal property" shall include a film, sound recording, video tape, book, or similar property.
>
> ***

26 U.S.C. § 263A (emphasis added).

Within the text of IRC § 263A itself, Congress' only description of what it intended "tangible personal property" to mean is that it "shall include a film, sound recording, video-tape, book or similar property." 26 U.S.C. § 263A(b)(1). Again, the express text of IRC § 263A does not support ABC's claim that it is settled federal income tax law that electricity is tangible personal property.

The context in which Congress used the phrase "tangible personal property" within IRC § 263A, and the purpose of that statute, are not comparable to the context and purpose of IITA § 201(e)(1)(3). Section 263A was enacted to require taxpayers subject to that provision to capitalize all direct and certain indirect costs properly allocable to real property and tangible personal property produced by the taxpayer, and to real property and personal property (described in IRC § 1221(1)) which is acquired by the taxpayer for resale. 26 C.F.R. §§ 1.263A-1(a)(3)(i). The IRS has adopted regulations under §§ 1.263A-1 through 1.263A-6 to provide guidance to taxpayers required to capitalize certain costs under § 263A. 26 C.F.R. § 1.263A-1(a)(1). Regulations applicable to producers are set forth in § 1.263A-2, and those applicable to resellers are set forth in § 1.263A-3. 26 C.F.R. § 1.263A-1(a)(1).

Neither the text of IRC § 263A nor the treasury regulations promulgated pursuant thereto expressly provide that tangible personal property, as used in IRC § 263A, includes electricity. 26 U.S.C. § 263A; 26 C.F.R. §§ 1.263A-1, 1.263A-2. The determinations set forth in the PLR's, etc., that ABC relies upon, moreover, reveal that the IRS has taken that particular position because it has determined that this particular method of accounting best reflects how such persons earn income. *See, e.g.* 2001 WL 1659980 (IRS PLR)

(Sept. 25, 2001) ("Coal transportation and material handling costs [of the electric utility] are subject to capitalization requirements [of 263A] and cannot be deducted until the associated coal is consumed and electricity is produced. Treas. Reg. § 1.446-1(a)(2) provides that no method of accounting is acceptable unless, in the opinion of the Commissioner, it clearly reflects income. See also IRC § 446(b)."). That is the context in which the IRS has posited that, "[g]eneration of electricity constitutes production of tangible personal property" for purposes of IRC § 263A. 2001 WL 1659980 (IRS PLR) (Sept. 25, 1991); 2001 WL 1638435 (IRS CCA) (Sept. 18, 2001); 2001 WL 1451836 (IRS PLR) (June 20, 2001); 2001 WL 1451856 (IRS PLR) (Aug. 14, 2001).

A review of the PLR's, etc., cited by ABC, moreover, shows that the IRS's position is not premised upon any IRS employee's reading of any federal judicial or tax court decisions. Instead, that position is based on decisions issued by foreign state courts, pursuant to schemes of state taxation that are quite different than Illinois'. For example, each of the PLR's contain the near identical paragraph, which states as follows:

> IRC § 263A applies to the cost of coal used in the production of electricity for sale to customers as follows:
> (1) Producers of electricity are subject to IRC § 263A. Generation of **electricity** constitutes production of **tangible personal property**. See Helvey v. Wabash County REMC, 278 N.E.2d 608 (Ind. App. 1972); Minnesota Power & Light Company v. Taxing District, 182 N.W.2d 685 (Minn. 1970); Curry v. Alabama Power Co., 8 So.2d 521 (Ala. 1942); State Tax Commission v. Marcus J. Lawrence Mem. Hosp., 495 P.2d 129 (Ariz. 1972). Thus, all direct and indirect costs attributable to the production of electricity for sale to customers are subject to capitalization in accordance with the requirements of IRC § 263A and the regulations thereunder. See IRC §§ 263A(a) and 263A(b)(1); Treas. Reg. § 1.263A-1(a)(3)(ii).

2001 WL 1659980 (IRS PLR) (Sept. 25, 1991); 2001 WL 1638435 (IRS CCA) (Sept. 18, 2001); 2001 WL 1451836 (IRS PLR) (June 20, 2001); 2001 WL 1451856 (IRS PLR) (Aug. 14, 2001).[4] In other words, the IRS' position that electricity is tangible personal property is not based so much on *federal* law, as it is, instead, based

[4] While there are slight variations in the language of the first sentence quoted above in some of the PLR's, each cites to the same four state decisions to support the IRS's position.

on its employees reading of judgments entered by state courts involving the interpretation of Indiana, Minnesota, Alabama and Arizona statutes.

On this point, it is well to recall that this is not the first time that foreign case law been offered to support a particular interpretation of Illinois' tax laws. For example, in Farrand Coal Co., the Court noted that:

> Most of the authorities relied on by plaintiff [taxpayer, Farrand Coal Co.] holding electricity to be tangible personal property are from foreign jurisdictions involving statutes specifically declaring electricity to be such. Of course, such definition is not present in the instant statute here in issue. The other cases relied on by plaintiff hold electric utility companies to be engaged in manufacturing commodities. Such cases are contrary to the holding of this court in People ex rel. Mercer v. Wyanet Electric Light Co., 306 Ill. 377, 137 N.E. 834, that electric utility companies are neither manufacturing nor mercantile companies so as to have their capital stock assessed locally instead of by the State assessing authority.

Farrand Coal Co., 10 Ill. 2d at 512, 140 N.E.2d at 701; *see also* Kroger v. Department of Revenue, 284 Ill. App. 3d 473, 673 N.E.2d 710 (1st Dist. 1996) (holding that taxpayer's reliance on case law from other jurisdictions, while ignoring applicable Illinois case law, did not constitute reasonable cause sufficient to abate a late payment penalty). In this regard, ABC would similarly have me conclude that IITA § 102 reflects the Illinois General Assembly's unarticulated abandonment of each and every judicial decision entered into by an Illinois court prior the passage of the IITA, as such decision might be used as a guide to the meaning of terms used in the IITA, and that § 102 simultaneously reflects the legislature's adoption (again, *sub silencio*) of the judicial decisions by courts in states having wholly different schemes of taxation than Illinois, so long as the IRS accepts such foreign case law as supporting its interpretation of a term used in both the IRC and the IITA. *See* ABC's MSJ, p. 4. Again, I cannot conclude that IITA § 102 has the effect ABC suggests.

Finally, while I conclude that the sources cited by ABC have no precedential effect on this contested case, I also acknowledge that, as a practical matter, the IRS's determinations that producers of electricity must use the method of accounting set forth in IRC § 263A seem perfectly reasonable, at least for purposes of IRC § 263A. The question the IRS is addressing in most of those PLR's, etc., after all, is whether § 263A's method of

accounting, or some other one, more clearly reflects how a particular person earns income. But IRC § 263A does not create a credit to be applied against a particular type of tax liability, like IITA § 201(e), or provide a description or definition of the persons entitled to claim a credit, like IITA § 201(e)(3). Nor does a determination of whether a person is required to use the particular accounting method required by § 263A have the significant tax consequences that accompany a determination whether, under Illinois law, the person is engaged in the business of retailing or manufacturing. *See, e.g.*, 35 **ILCS** 105/1 (use tax does not apply to purchases of tangible personal property for resale by a retailer, or to tangible personal property purchased and resold as an ingredient of an intentionally produced product or by-product of manufacturing), 105/3-5 (18) (use tax exemption for purchases of tangible personal property used primarily as manufacturing machinery and equipment); Schawk, 326 Ill. App. 3d 752, 761 N.E.2d 192. Since the purpose and context of IRC § 263A are not comparable with the purpose and context of IITA § 201(e), § 102 of the IITA does not require that § 201(e)(3)'s definition of "retailing" be governed by the meaning the IRS has ascribed to the phrase "tangible personal property," as used in IRC § 263A. 35 **ILCS** 5/102.

Whether Electricity Constitutes Tangible Personal Property As A Matter Of Scientific Fact

ABC asserts that electricity is tangible personal property as a matter of scientific fact because it: (1) is both physical and material (ABC's MSJ, pp. 6-7 & Exs. A (Fajans' Affidavit, ¶ 2), A-1 (Fajans' report, pp. 1, 5, 15); (2) can be sensed, measured, stored and weighed (ABC's MSJ, p. 7 & Ex. A-1 (pp. 5-7, 10-11)); (3) is easily stored (ABC's MSJ, p. 7 & Ex. A-1 (pp. 7-9)); and (4) has mass and weight (ABC's MSJ, p. 7 & Ex. A-1 (p. 12)). ABC argues that the proceedings in other courts, and specifically, the facts and evidence considered by the Illinois Supreme Court in the Farrand Coal Co. decision, cannot be considered here, because the expert testimony in that case is not part of this record. ABC's MSJ, p. 5. ABC contends that:

> If the properties of electricity are a question of law, as the Department submits, then *ABC* is entitled to judgment because the controlling authorities —

> that is, the [IITA], and by reference, the federal income tax laws — hold that electricity is tangible property. However, if the properties are a question of fact, then the taxpayer is *still* entitled to summary judgment because there are no facts of record contradicting Fajans' expert testimony that, as a matter of objective scientific fact, electricity is both physical and material.

ABC's MSJ, p. 8 (emphasis original).

I have already concluded that the meaning of tangible personal property, as used in § 201(e)(3) and in other sections of the IITA, is made clear by the consistent use of the identical phrase within different provisions of the IITA. Illinois law, therefore, does not require that IITA's definition of retailing in 201(e)(3) be controlled by the meaning the IRS has ascribed to the phrase tangible personal property, as used in § 263A of the IRC. 35 **ILCS** 5/102. I conclude also that, if the properties of electricity were at issue in this case, that issue would constitute an issue of fact. But neither party disputes the properties of electricity.[5] Since the parties filed cross-motions for summary judgment, the dispute is one of law. Lake Co. Stormwater Mgmt. Comm. v. Fox Waterway Agency, 326 Ill. App. 3d at 104, 759 N.E.2d at 973.

The same fundamental legal issues presented here were presented in the analogous case of Farrand Coal Co.: did the Illinois General Assembly intend electricity to be embraced within the meaning of the phrase tangible personal property, as that phrase is used in § 201(e) of the IITA (and as that phrase was used within the ROTA, when Farrand Coal Co. arose); and is a provider of electricity primarily engaged in retailing, as that term is defined in § 201(e)(3) of the IITA (and as the word retailer was used in the ROTA in 1957)? The Illinois General Assembly has consistently articulated, within the IITA itself, a distinction between tangible personal property and intangible property. *E.g.*, 35 **ILCS** 5/303, 304. Thus, nothing within ABC's motion leads

[5] In a motion filed during the course of briefing the parties' cross-motions, ABC asked that a statement in the Department's Brief be considered an admission that the properties of electricity were at issue, so as to preclude entry of summary judgment in the Department's favor. But acknowledging that different persons may hold conflicting opinions on a particular issue does not create a factual dispute, when the issue involves the meaning of statutory phrase. *See* Lake Co. Stormwater Mgmt. Comm. v. Fox Waterway Agency, 326 Ill. App. 3d at 104, 759 N.E.2d at 973.

me to conclude that when the Illinois legislature used the phrase tangible personal property in § 201(e)(3)'s definition of retailing, it intended to include within that phrase intangible property, like electricity.

Whether The Department's Enforcement Of § 201(e) Violates The Illinois Constitution's Uniformity Clause

ABC argues that, if it is not granted the credit claimed here, the Department's enforcement of the § 201(e) credit would violate the Uniformity Clause of the Illinois Constitution. The uniformity clause states that, "[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const.1970, art. IX, § 2; Geja's Cafe v. Metropolitan Pier & Exposition Authority, 153 Ill. 2d 239, 247, 606 N.E.2d 1212, 1215 (1992).

Initially, I note that the Illinois Supreme Court has acknowledged that since "[s]tatutes are presumed constitutional, and broad latitude is afforded to legislative classifications for taxing purposes[,]" its scope of inquiry when reviewing such challenges is relatively narrow. Geja's Cafe, 153 Ill. 2d at 248, 606 N.E.2d at 1216. A person challenging such a classification has the burden of showing that it is arbitrary or unreasonable, but if a state of facts can be reasonably conceived that would sustain it, the classification must be upheld. *Id*.

ABC bases its uniformity argument, in part, on the following sworn statement that the Department made in response to the following request to admit facts:

> Request 4: The Department had granted the personal property replacement income tax credit as referenced in 35 ILCS 5/201(e) to a "regulated" electric utility.
> Answer: [precatory objections omitted]
> Without waiving its objection, the Department hereby denies that it has "granted" the personal property replacement income tax credit as referenced in 35 ILCS 5/201(e) to a "regulated" electric utility. However, between the tax years 1992 and 1998, a combined gas and electric utility did file an amended return claiming the Credit for property used in its electricity business. The Department did not audit the amended return and the taxpayer received the benefit of the Credit.

Department's Motion to Strike Sections of Taxpayer's Cross-Motion for Summary Judgment and Exhibits, pp. 5-6; Order, dated 3/12/04 (granting in part and denying in part the Department's motion to strike), ¶ 4.

In its motion, ABC paraphrases the Department's response with the following argument:

> The Department's enforcement of the investment credit statute cannot survive uniformity scrutiny. The agency has admitted to allowing a combined gas and electric utility to claim the investment credit for property used in the taxpayer's electric utility business. (Dept's Resp. to Taxpayer's 1st Request to Admit Facts, No. 4). And, while XYZ itself is not a combined gas and electric utility company, the distinction is wholly arbitrary.

ABC's MSJ, p. 11.

ABC, however, either misstates or misconstrues the Department's response to its request to admit. The Department did not admit that it knowingly determined that a combined gas and electrical utility company was entitled to a credit for the property used in the company's electric utility business. Rather, the Department's admission is that it did not audit a single company's amended returns, and that, as a result, that particular company received the benefit of the credit. Read *in toto*, the Department did not so much admit that it granted a § 201(e) credit to a taxpayer in the same business as ABC, as it admitted that it processed a particular taxpayer's amended returns without determining, as a matter of fact (which, after all, is one of the functions of an audit), that the taxpayer was entitled to the credit claimed. The Illinois Constitution's uniformity clause, however, was never intended to bestow a constitutional right of equal treatment for a taxpayer who has discovered that Illinois' tax agency has mistakenly allowed a credit in a situation where the credit should not have been allowed, or mistakenly failed to assess tax in a situation where tax was due. The clause was intended to provide relief from arbitrary legislative classifications, not to require an agency to perpetuate any mistake it might have made in administering the legislature's acts. *See* Geja's Cafe, 153 Ill. 2d at 252, 606 N.E.2d at 1218 ("The uniformity clause was not designed as a straitjacket for the General Assembly. Rather, the uniformity clause was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers.").

ABC also invokes the uniformity clause because the Department allows, that is to say, it has made a policy decision to grant, such credits to natural gas utility companies, but not to electrical utility companies. *See* ABC's MSJ, pp. 13-16. ABC asserts that, "there is no possible justification for discriminating between natural gas and electric companies when it comes to the object of the investment credit statute." *Id*. at 13.

Classifications within nonproperty tax acts must be based on real and substantial differences between those taxed and not taxed, and must bear some reasonable relationship to the object of the legislation or to public policy. Geja's Cafe, 153 Ill. 2d at 247, 606 N.E.2d at 1215 (referring to this as "the Searle test," as previously announced in Searle Pharmaceuticals, Inc. v. Department of Revenue, 117 Ill.2d 454, 512 N.E.2d 1240 (1987)). When a good-faith uniformity challenge is made, a taxing body must produce a justification for its classifications. The taxpayer then has the burden to persuade that the defendant's explanation is insufficient as a matter of law, or unsupported by the facts, to satisfy the Searle test. Geja's Cafe, 153 Ill. 2d at 248-49, 606 N.E.2d at 1216.

Here, and in response to ABC's uniformity challenge, the Department counters that the real and substantial differences between persons engaged in the business of selling natural gas and those, like XYZ, who are engaged in the business of selling electricity, is that the former are selling tangible personal property (Archer Daniels Midland Co. v. City of Chicago, 294 Ill. App. 3d 186, 689 N.E.2d 392 (1st Dist. 1997)), whereas the latter are providing others with intangible property. Farrand Coal Co., 10 Ill. 2d at 513, 140 N.E.2d at 701. This distinction, moreover, is one that has been pronounced by judicial determination, and not established by the legislature. I agree that there is a real and substantial difference in the classes of persons to whom the credit is available, and that this difference is related to Illinois' longstanding public policy of treating differently, for tax purposes, persons who sell tangible personal property versus persons who do not. Since the Illinois General Assembly made the linchpin of the definition of retailing the type of the property the person

was engaged in the business of selling, moreover, the real and substantial difference between electric utilities and natural gas utilities is also related to the purpose of the § 201(e) credit. 35 ILCS 5/201(e)(2)(D), (e)(3).

Conclusion:

Because it does not sell tangible personal property, ABC is not primarily engaged in retailing, as that term is defined in § 201(e)(3) of the IITA. Treating electric utilities differently than natural gas utilities differently, for purposes of § 201(e) of the IITA does not violate the uniformity clause of the Illinois Constitution. I recommend, therefore, that the Director grant the Department's Motion, that he deny ABC's Motion, and that he finalize the Denials previously issued, pursuant to statute.

Date: 8/18/2004

John E. White
Administrative Law Judge